

**PUBLIC INTEGRITY COMMISSION
MINUTES
August 21, 2018
10:00 A.M.**

1. Call to Order: 10:08 a.m. Present: Bonnie Smith (Chair); William F. Tobin, Jr. (Vice-Chair), Michele Whetzel (Vice-Chair); Commissioner: Andrew Manus. Commission Counsel: Deborah J. Moreau, Esq.

2. Approval of Minutes for July 17, 2018: Commissioner Whetzel suggested changes to language that appeared on page 3, just above the paragraph marked 'C'. Commission Counsel made the recommended changes. Motion to approve the amended minutes. Moved-- Commissioner Whetzel; seconded—Commissioner Manus. Vote 4-0, approved.

3. Administrative Items

A. Commission Counsel is working on PIC's response to the Supreme Court in matter #16-15.

B. No regular meeting on October 16, 2018. Commission Counsel will be on vacation.

4. Motion to Go Into Executive Sessionⁱ to Hear Requests for Advisory Opinions, Waivers and Referrals. Moved—Commissioner Tobin; seconded—Commissioner Manus. Vote 4-0, approved.

5. 18-28—Post-Employment

[Employee] worked for a State [Agency] as an Engineer. His job duties included maintaining [one of the Agency's] websites (provided technical guidance); reviewed plans; reviewed estimates and bid proposals to ensure compliance with [Agency] guidelines; provided technical information to assist in the updating of procedure manuals; maintained PC hardware and components. [Employee] retired from State service in August 2018.

[Employee] intended to seek work as an engineer for a private firm, possibly one of [Agency]'s contractors. At the time of the hearing, he had not yet submitted an employment application. [Employee] stated that contractors had been reluctant to discuss possible job opportunities with him until after he had obtained an opinion letter from the Commission. He anticipated his job duties would include preparing plans for projects and/or mentoring young engineers.

[Employee] asked the Commission to decide if his proposed post-retirement work would violate the post-employment restriction in the Code of Conduct.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not “directly and materially responsible” for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff’d*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official’s responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not “directly and materially responsible” for that particular matter.

The Federal Courts have stated that “matter” must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same “matter,” Courts have held that it is the same “matter” if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

To determine if there was substantial overlap, the Commission compared the duties and responsibilities during employment to the proposed post-employment activities. Like the matter in *Beebe*, [Employee] worked on the subject matter, engineering, while working for the State. However, the court in *Beebe* drew a specific line between the subject matter and its application to specific facts. In analogous situations the Commission had approved post-employment positions for [Agency] workers who left State employment to work for one of the Agency’s contractors so long as they did not work on the same projects. *Commission Ops. 12-09 and 13-41; see 18-03 (attached)*. The Commission is to strive for consistency in their opinions. 29 Del. C. § 5809(5).

[Employee]’s job duties at [Agency] were primarily intra-agency and did not require him to work on outside projects with any of the [Agency]’s contractors. One of his duties was to review and update technical information which was posted on the website for use by interested parties, including the public. While [Employee], on behalf of his future employer, could refer to the technical information on the website, he would not be responsible for the content contained therein, like he was as a [Agency] employee. By way of analogy, it was the difference between reading a book and authoring a book. The content of the book would not be affected by the reader. Therefore, his use of [Agency]’s technical information after he obtained employment in the private sector would not violate the post-employment restriction in the Code of Conduct.

The Commission did remind [Employee] of the prohibition against revealing *any* confidential information gained during his employment with the State. 29 Del. C. § 5805(d). For example, he may not disclose to his future employer the intricacies of [Agency]’s bid scoring system which he described during the hearing.

Motion: [Employee]’s proposed post-retirement employment as an engineer did not appear to violate the Code of Conduct’s two year post-employment restriction. Moved—Commissioner Whetzel; seconded—Commissioner Smith. Vote 4-0, approved.

6. 18-27—Private Interest (*Commissioner Tobin dissenting*)

[Employee] worked for [a State Agency that monitored a specific set of clients]. [Employee] “provided, coordinated and monitored the delivery of [a specific service]. When asked if a treatment plan could include a recommendation that her client attend [business], she agreed that would be possible. If she were to make such a recommendation, her client and/or their family would be referred to the Division of Social Services (“DSS”) to determine eligibility and to select a provider. The names of eligible providers are available for public inspection.

[Employee] and her sister had purchased a [business]. The [business] was fully operational at the time of purchase but its operation was suspended while [Employee] and her sister navigated the statutory and regulatory processes necessary to operate the [business]. [Employee] described her anticipated role as working with her sister and other staff regarding the operations of the [business]. A majority of the [business]’s previous clients were [subsidized by the State]. [Under the terms of the subsidy], the State paid the [business] directly.

All [similar businesses] were licensed and regulated by a subdivision of [Employee’s State agency]. As required, she submitted an application for a [business] license. The licensing process was halted when a question arose as to whether her license application, submitted to a subdivision within her State agency, may have created a conflict of interest in violation of the State’s Code of Conduct. The licensing process was put on hold pending the Commission’s determination as to whether her personal interest in the [business] created a conflict of interest with her State job duties.

A. State employees may not review or dispose of State matters if they have a personal or private interest that may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1).

[Employee] had a private interest in the [business] through her co-ownership. However, her State job duties did not require her to work with, license or regulate [such businesses]. When asked at the hearing if she could foresee any way her State job duties would require her to perform duties related to a [similar business], she responded that it may be possible that she would recommend a [similar business to one of her clients]. If [her client] could not afford the costs of [the business], [Employee] would refer them to [another Department] to determine their eligibility for [subsidization]. If approved for the benefit, [the other Department] would direct the [client] to select a [business] from a list of participating [businesses]. Thereafter, [that Department] would directly reimburse the [business] for the client’s expenses. In the scenario [Employee] described, there was a possibility that her client could choose her [business] as the provider. In that instance, she would be making a referral in her official capacity that would benefit her financially as a co-owner of the [business]. However, because [Employee] would have no part in reviewing or disposing of the matter once the referral for services was made, her ownership of the [business], alone, did not violate this provision of the Code of Conduct.

B. State employees may not represent or otherwise assist a private enterprise on matters before the agency with which they are associated by employment. 29 Del. C. § 5805(b)(1).

State employees are not to deal with their own agency to insure decisions by their colleagues and coworkers are not unduly influenced by another employee's connection to the private enterprise.

Delaware Courts have addressed the concern when that occurs. *W. Paynter Sharp & Son, Inc. v. Heller*, 280 A.2d 748, 752 (Del. Ch., 1971). In that case, an appointee to DNREC's Fish and Wildlife Advisory Council, which was under the Fish and Wildlife Division, sought to contract with the Division on matters where the Division had specific authority and responsibility. *Id.* at 751. The Cabinet Secretary declined to contract with him, even though the contract was publicly noticed and bid, and even though he was the lowest bidder. *Id.* at 750-751. The Secretary was concerned about the close association between the appointee and the Division and wanted to "avoid any allegation or suggestion of undue influence in the letting of contracts by this Department." *Id.* at 750. The Court noted at that time that the State had no specific conflict of interest law. *Id.* at 751. It also noted that there was nothing in the record to show that the State official secured the contract as the result of anything other than submitting the lowest responsible bidder, but it approved the Secretary's action saying: "the award of contracts for public works has been suspect, often because of alleged favoritism, undue influence, conflicts and the like" and "it is vital that a public agency have the confidence of the people it services and, for this reason, it must avoid not only evil but the appearance of evil as well." *Id.* at 752. Three years later, a Code of Conduct was passed that included the bar against State employees, and appointees to an agency's Boards or Commissions, dealing with their own agency, and it was deemed one of the provisions the General Assembly found "to be so vital" that it carries a criminal penalty. 29 Del. C. § 5805(f).

[Employee's business would] be monitored, regulated and licensed by a subdivision of [her Agency]. Although she did not work in the [same subdivision as the regulating body], her ownership of the [business] would require her to interact with [those] employees. In fact, she had already applied to [the subdivision] for a [business] license. The licensing and ongoing regulatory process would require her to represent her private interest before her own agency which is prohibited by the Code of Conduct. Because the licensing process had already begun, she had employees ready to staff the [business] and there were clients who may have been displaced while she waited for the Commission's decision, the Commission did not request that [Employee] withdraw her pending license application. However, as soon as the [business] was licensed and operating, [Employee's] sister (or someone else with an ownership interest) had to have the license transferred into their name (if possible) or reapply for licensing under their own name. That condition had to be completed within 90 days of the [business'] resumed operations. Once the [business] was no longer licensed in her name, [Employee] would no longer be required to represent her private interest before her own agency, thus removing the conflict of interest. Of course, that meant that she could not intervene in the [business'] licensing and regulatory issues moving forward.

C. State employees are to pursue a course of conduct which will not raise suspicion among the public that they are engaging in acts in violation of the public trust and which will not reflect unfavorably upon the State. 29 Del. C. § 5806(a).

This is basically an appearance of impropriety test. The test is if the conduct would create in reasonable minds, with knowledge of all relevant facts, a perception that an official's ability to carry out duties with integrity, impartiality and competence is impaired. *In re Williams*, 701 A.2d 825 (Del., 1997). Actual violations of the Code of Conduct are not required; only the appearance thereof. *Commission Op.* No. 92-11; 63C Am. Jur. 2d Public Officers and

Employees 252 (actual conflict is not the decisive factor; nor is whether the public servant succumbs to the temptation; rather it is whether there is a potential for conflict).

Any reasonable person aware of this situation would question whether [Employee] would be able to carry out her State job duties with impartiality. Her private interest would be regulated by her division. A member of the public could question whether the [business] was being licensed and monitored by impartial parties because of her employment with the State. For that reason, during the time that the [business] was operating under a license in her name, the [business] could not accept [clients receiving State subsidies]. Not only would that reduce the public's suspicion that the client's at the [business] were referred there by [Employee] or her colleagues, it also reduced the likelihood that she would encounter one of her State clients while working at the [business]. In the event that [Employee] encountered one of her State clients while working at the [business], she was advised to immediately contact her State supervisor and ask to recuse herself from working with that client.

Under this provision, the Commission also considered whether it could be perceived that an official was using public office for personal gain or benefit, which is barred by the Code. 29 Del. C. § 5806(e). To avoid that perception [Employee] could not tell her State clients that she had an ownership interest in the [business]. In addition, she could not use her State position to gain access to [her Agency's] files regarding her [business], or those of her competitors. That was not to say that the Commission believed she would do so, she was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del. January 29, 1996). The Commission merely wanted to make her aware of the rules so that she could avoid further difficulties while serving in her dual roles.

Motion: No conflict because her State job duties didn't involve [similar businesses]. Moved—Commissioner Whetzel. No second. Further discussion of the facts and their application to the law followed. Commissioner Whetzel withdrew her motion.

Motion: To lessen the appearance of impropriety, [Employee]'s [business] could not accept [State subsidies] until the [business] was no longer licensed in her name. [Employee] must be removed from the [business]'s license within 90 days of the [business]' resumed operations. To avoid a conflict of interest, [Employee] could not act as a liaison between the [business] and [her Agency]. Moved—Commissioner Manus; seconded Commissioner Smith. Vote 3-1, approved.

Commissioner Tobin dissented on the grounds that [Employee]'s ownership of the [business] created an appearance of impropriety.

7. 18-29—Private Interest

[Applicant] worked in the private sector as a consultant [in a specific field]. [Although she was engaged in the same type of work as a particular State Agency, she rarely had contact with them]. In fact, in 20 years of working in the field she had only been to the [Agency]'s offices on three occasions. On those occasions she acted as a courier and dropped off samples for one of her clients.

[Applicant] applied for, and was offered, a position with a [State Agency] as an Administrator. The Administrator was responsible for managing [various State programs]. Those programs involved the regulation of [industries similar to those for whom she consulted].

The Administrator was also responsible for the enforcement of state/federal [regulations]. [Applicant] wanted to accept the Administrator position but because of her consulting work, the [Agency] recommended she meet with the Commission to verify that her private interest did not create a conflict of interest with the [Agency] position.

A. State employees may not review or dispose of State matters if they have a personal or private interest that may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1).

As part-owner of the [consulting business], [Applicant] had a private interest. If she were to accept the [Agency]'s job offer, she would maintain her ownership interest but would no longer work as an on-site consultant. As a consequence, the Commission was unable to identify any circumstances under which her ownership interest would impair her official judgment while performing her State job duties.

B. State employees are to pursue a course of conduct which will not raise suspicion among the public that they are engaging in acts in violation of the public trust and which will not reflect unfavorably upon the State. 29 Del. C. § 5806(a).

This is basically an appearance of impropriety test. The test is if the conduct would create in reasonable minds, with knowledge of all relevant facts, a perception that an official's ability to carry out duties with integrity, impartiality and competence is impaired. *In re Williams*, 701 A.2d 825 (Del., 1997). Actual violations of the Code of Conduct are not required; only the appearance thereof. *Commission Op.* No. 92-11; 63C Am. Jur. 2d Public Officers and Employees 252 (actual conflict is not the decisive factor; nor is whether the public servant succumbs to the temptation; rather it is whether there is a potential for conflict).

While [Applicant] had worked in [the industry] for over 20 years, the work she performed as a consultant did not overlap with the Administrator's job duties. That separation would assure the public that she would be able to carry out her State job duties with integrity and impartiality. In addition, the Administrator position was posted on the State's website assuring the public that she was offered the position after a transparent and competitive application process.

Motion: [Applicant]'s ownership interest did not create a conflict of interest with the Administrator's job duties as long as she did not continue to work as a consultant. Moved—Commissioner Manus; seconded Commissioner Tobin. Vote 4-0, approved.

8. 18-14—Complaint (*Commissioners Tobin and Smith recusing*)

Commissioners Manus and Whetzel discussed possible dates in October 2018 for the formal hearing.

9. Adjournment: Next meeting September 18, 2018. No regular October 2018 meeting.

ⁱ Pursuant to 29 Del. C. § 10004(6) to discuss non-public records (29 Del. C. § 10002(6) Any records specifically exempted from public disclosure by statute or common law), as the written statements required for advisory opinions and complaints are subject to the confidentiality standards in 29 Del. C. § 5805(f), 29 Del. C. § 5807(d) Advisory Opinion Requests, and 29 Del. C. § 5810(h) for Complaints. Further, the proceedings, like personnel actions are, by statute, closed unless the applicant for the advisory opinion requests a public meeting, 29 Del. C. § 5805(f), 29 Del. C. § 5807(d), or the person charged in a complaint requests a public meeting. 29 Del. C. § 5810(h). No applicant for an advisory opinion, nor a person charged by a complaint has requested an open meeting.